Supreme Court, U.S.
FILED

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No. 03 865 DEC 10 2003

IN THE

Supreme Court of the United States

In Re EGRI

NANCY BURTON,

Petitioner,

—v.—

CONNECTICUT YANKEE ATOMIC POWER COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the All Writs Act, 28 U.S.C. § 1651, empower a district court to issue an injunction against a non-party attorney to enforce a consent decree where the district court performed a *pro forma* endorsement of the consent decree privately negotiated between the parties without adjudicating the merits and where the decree promotes violation of state law?

2. Does the All Writs Act empower a district court to enter contempt orders against a non-party attorney for engaging in protected free speech activities and to impose prior restraints of free speech activities?

3. When it imposed a $171,546.80 punitive contempt sanction against the petitioner attorney personally, did the trial court commit plain error when it abused its discretion by failing to afford due process safeguards mandated by *International Union, United Mine Workers v. Bagwell*, 512 U.S. 821 (1994)?

PARTIES TO THE PROCEEDINGS

Petitioner: Nancy Burton, Plaintiffs' counsel

Respondent: Connecticut Yankee Atomic Power Company

Parties Below:

Plaintiffs:

Andrew J. Egri, an individual
Edward Munster, an individual
Neighbors Opposed to Residential Atomic Dumps

Defendants:

Town of Haddam Board of Selectmen, a municipal agency

Alan Paskowich, in his official capacity as building official of the Town of Haddam, Connecticut

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Nancy Burton, Petitioner, by undersigned counsel, requests that this Court issue a writ of *certiorari* to the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit (App. 1a) is unreported.

JURISDICTION

The Summary Order of the Court of Appeals for the Second Circuit was filed on July 1, 2003. The Court of Appeals denied petitioner's Petition for Rehearing *En Banc* on September 11, 2003.

This Court has jurisdiction under 28 U.S.C. § 1254.

Subject matter jurisdiction for the Court of Appeals for the Second Circuit was invoked under 28 U.S.C. § 1291.

STATUTORY PROVISIONS INVOLVED

The All Writs Act, 28 U.S.C. § 1651, provides as follows:

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

The First Amendment to the U.S. Constitution provides as follows:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

The district court held the petitioner, Nancy Burton, an attorney acting *pro bono publico*, in contempt of court and ordered her personally to pay the respondent, Connecticut Yankee Atomic Power Company ("Connecticut Yankee") $171,546.80 for engaging in the following activities on behalf of her clients, residents of the town of Haddam, Connecticut:

1. Participating in public hearings of the Haddam inland wetlands commission;
2. Writing letters to the inland wetlands commission; and
3. Instituting two lawsuits under the Connecticut Environmental Protection Act, Connecticut General Statutes § 22a-14 et seq.

Upon the respondent's motion, the district court ruled that petitioner acted in violation of its Order Granting Permanent Injunction,[1] an order issued pursuant to the authority of the All Writs Act, 28 U.S.C. § 1651.

The Order on Permanent Injunction, entered in the case of *Andrew J. Egri et al. v. Connecticut Yankee*

[1] The Order Granting Permanent Injunction appears in the Appendix at 26a.

Atomic Power Company et al. ("*Egri*") enjoins the *Egri* plaintiffs and their attorney, the petitioner, from interfering with implementation of a stipulation entered as a consent decree in a related case, *Connecticut Yankee Atomic Power Company v. Town of Haddam et al.* ("*Connecticut Yankee*"), in which the district court denied the *Egri* plaintiffs' motions to intervene and to which they were not parties.

Connecticut Yankee instituted its suit on November 21, 2001 to secure a building permit to construct a high-level radioactive waste repository on property it owned which was zoned for residential uses. The company had applied to the Haddam zoning commission to rezone the property to permit such a use, but, following public hearings, the zoning commission denied the application unanimously. Rather than appeal the decision to the state courts pursuant to state law, Connecticut Yankee instituted its suit against the Haddam Board of Selectmen, the town's governing body, and the town itself, in federal court seeking monetary damages and declaratory relief to obtain a building permit. Under Connecticut state and municipal law, a municipal building official cannot issue a building permit without a certificate that the proposed construction activity complies with the town's zoning regulations. In this case, because the zoning regulations prohibit radioactive waste repositories in residential zones, a building permit could not legally be issued without a zone change. Connecticut General Statutes § 8-3(f). ("No building permit or certificate of occupancy shall be issued for a building, use or structure subject to the zoning regulations of a municipality without certification in writing by the official charged with the enforcement of such regulations that such building, use or structure is in conformity with such regulations or is a vaild nonconforming use under such regulations.").

Connecticut Yankee had previously instituted a similar suit but it was dismissed by the district court on grounds that the controversy was not ripe for adjudication: the company had failed to plead that it had applied for or been denied a building permit. The dismissal was affirmed on appeal.

In *Connecticut Yankee*, the second suit, the company alleged it had applied for a building permit, but it did not allege that the town had denied the application.

On December 19, 2001, seven days before the town of Haddam defendants appeared in the case, the district court ordered a status conference. It is not clear from the record whether the town of Haddam defendants were notified of the status conference because the court's order lists only Connecticut Yankee's attorneys in its order. Nevertheless, the parties engaged in settlement negotiations which led to a privately negotiated stipulation, the "Order on Consent of Parties," whereby, *inter alia*, the Selectmen would cause a building permit to be issued to Connecticut Yankee and Connecticut Yankee would in turn pay the Town of Haddam $10 million.[2] The zoning commission was not a party to the suit. The consent order also contained the following term:

> WHEREAS, Connecticut Yankee has previously obtained from the Haddam Inland Wetlands Commission a wetlands permit in connection with the proposed ISFSI [acronym for the nuclear waste facility, Independent Spent Fuel Storage Installation] which permit remains valid and in full force and effect

The Inland Wetlands Commission was not a party to the suit.

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[2] See Order on Consent of Parties, Appendix at 29a.

On January 21, 2002 the Selectmen conducted a public meeting to disclose the terms of their proposed settlement with Connecticut Yankee. Although they possessed the draft agreement, they withheld it from the public and presented instead a "dumbed-down" version which did not mention the wetlands permit, among other omissions. The town's attorney told the meeting that the public would not see the actual terms of the agreement until after it was signed by the Selectmen.

The Selectmen signed the stipulation on January 22, 2002. It was thereupon submitted to the district court. The district court endorsed the "Order on Consent of Parties on January 29, 2002.

Prior to endorsing the privately negotiated Order on Consent of Parties, the district court had not conducted any hearings in the case nor received evidence. The district court endorsed the parties' Order on Consent of Parties as submitted to it by the parties, without modification.

Once the terms became known, a citizens group formed under the name Neighbors Opposed to Residential Atomic Dumps ("NORAD") to object to the settlement on grounds *inter alia* that the Selectmen lacked authority to override a valid zoning decision and to issue a building permit for $10 million when the company could not obtain one lawfully.

Andrew J. Egri and Edward Munster, abutting property owners to the Connecticut Yankee site, and NORAD engaged the petitioner to represent them in a declaratory judgment action in the Connecticut Superior Court to invalidate the Selectmen's agreement as beyond their authority under state law. Egri also engaged the petitioner to represent him in an appeal of the issuance of the building permit.

On February 28, 2002, the petitioner (1) filed a building appeal on Egri's behalf; (2) filed a motion on Egri's behalf to intervene in *Connecticut Yankee*; and (3) instituted Egri, a suit in the state court on behalf of Egri, Munster and NORAD to invalidate the Selectmen's agreement.

On the eve of a hearing on the plaintiffs' application for a temporary injunction, Connecticut Yankee removed *Egri* to the district court, where it was assigned to Hon. Alan H. Nevas who was also presiding over *Connecticut Yankee*. Upon Connecticut Yankee's application and after a hearing, pursuant to the All Writs Act, the district court issued a temporary restraining order and subsequently the Order Granting Permanent Injunction in *Egri* on March 15, 2002. The order was issued notwithstanding the submission of an amicus curiae brief by the state attorney general which characterized the Selectmen's conduct as an illegal usurpation of the powers of the zoning commission.

The Order Granting Permanent Injunction enjoined Egri from prosecuting his building permit appeal and it enjoined the Town of Haddam from hearing or adjudicating his appeal.

In addition, the order provided as follows:

> Plaintiffs, their successors, assigns, agents and attorneys, and all persons with notice of the permanent injunction, are hereby permanently enjoined from seeking any judgment or administrative ruling that would invalidate or otherwise interfere with implementation of the Order [Order on Consent of Parties entered in Connecticut Yankee], including the Building Permit issued thereunder, other than by a direct

> appeal of this Court's Order or other filings in this action or in the Related Action [*Connecticut Yankee*].

Order Granting Permanent Injunction, Appendix at 26a.[3]

Petitioner's clients soon ascertained that Connecticut Yankee had not obtained a valid wetlands permit—contrary to the representation contained in the Order on Consent of Parties. Petitioner's clients discovered that Connecticut Yankee had submitted false, inaccurate and misleading information to secure a wetlands permit. For example, Connecticut had submitted a map of existing natural features depicting a narrow creek running alongside the site of the proposed storage facility when in fact there was a 10-acre beaver pond prone to flooding in that location. Petitioner's clients further ascertained that Connecticut Yankee had withheld from the wetlands commission the fact that it had illegally stored radioactive waste debris in an area to be used for fill during construction of the nuclear waste dump.

Petitioner's clients engaged her to write letters to the wetlands commission.[4] The purpose was in part to persuade town officials to move the district court pursuant to Fed. R. Civ. P. 60 to be relieved from operation of the Order on Consent of Parties because of Connecticut Yankee's fraud. They engaged her to represent them in pro-

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[3] Actual delays in construction of the ISFSI have occurred due to a contract dispute between Connecticut Yankee and its decommissioning contractor, Bechtel. Yet, when Bechtel sued Connecticut Yankee on June 23, 2003 over the dispute, in a case pending in the Connecticut Superior Court, *Bechtel Power Co. v. Connecticut Yankee Atomic Power Company*, CV 03 0523088 Connecticut Yankee did not remove the suit to the district court nor did it move for an injunction in the district court against Bechtel.

[4] Four such letters appear in the Appendix hereto at 39a *et seq.*.

[5] See letter Appendix 39a.

ceedings the wetlands commission convened after it verified that Connecticut Yankee had submitted inaccurate and incomplete information to obtain permits. The town's First Selectmen, Anthony Bondi, insisted that the town would continue to enforce its wetlands regulations with regard to the Connecticut Yankee site, notwithstanding the Order on Consent of Parties. Yet the wetlands commission did not enforce the requirements of its regulations, which also require zoning compliance.[5] Connecticut General Statutes § 22a-42a(1) ("No person shall conduct any regulated activity within an inland wetland or watercourse which requires zoning or subdivision approval without first having obtained a valid certificate of zoning or subdivision approval . . . establishing that the project complies with the zoning or subdivision requirements adopted by the municipality pursuant to chapters 1243 to 126, inclusive, or any special act.")

Petitioner's client, NORAD, next engaged her to institute suit on its behalf in the state court under the state's Environmental Protection Act seeking a declaration that Connecticut Yankee lacked a valid wetlands permit and had deceived the Commission to obtain permits. *Neighbors Opposed to Residential Atomic Dumps v. Inland Wetlands Commission et al.*, ("*NORAD*") On the eve of a hearing on an application for temporary injunction, Connecticut Yankee removed NORAD to the district court on June 17, 2002, and arranged for its assignment to Judge Nevas.

In the meantime, the Connecticut Historical Commission, a state agency, was preparing a nomination of the site including the proposed ISFSI for listing on the National Register of Historic Places. The Historical Commission had determined that the site possesses historical and archaeological value because of its association with Venture Smith, an African prince who was

kidnapped into slavery c. 1736 and who later achieved his freedom and amassed wealth as a resident of Haddam on the site of the proposed ISFSI.

In light of the Connecticut Historical Commission activity, the petitioner was engaged to institute suit in the Connecticut Superior Court on April 17, 2002 on behalf of David Warmsley, a direct lineal descendant of Venture Smith, pursuant to the Connecticut Environmental Protection Act, to protect the site from unreasonable destruction. *Warmsley et al. v. Connecticut Yankee Atomic Power Company*. ("*Warmsley*") On the eve of a hearing on an application for temporary injunction, Connecticut Yankee removed *Warmsley* on May 3, 2002 to the district court and arranged for its assignment to Judge Nevas.

On June 12, 2002, Connecticut Yankee moved that the petitioner be found in contempt of the Order Granting Permanent Injunction because of her conduct in participating in proceedings of the wetlands commission and writing letters on behalf of her clients, as well as instituting *NORAD* and *Warmsley*. The district court conducted a show-cause hearing at which it stated it would deny the motion for contempt if the petitioner would immediately withdraw *NORAD* and *Warmsley* without consulting her clients. The petitioner stated that ethical constraints prevented her from withdrawing the suits without obtaining her clients' authorization. Throughout the proceedings, the petitioner maintained that she had not violated the Order Granting Permanent Injunction nor did she understand that it prohibited the conduct in which she had engaged. She asserted that the Order on Consent of Parties had led to a "cascading effect of lawlessness" in land-use regulation in the Town of Haddam.The district court stated on the record that it "really didn't care." The district court rejected petitioner's

request to present evidence in the form of testimony from a client. The district court found the petitioner in contempt. The court ordered Connecticut Yankee to produce an itemized statement of its attorney's fees and granted petitioner's request to reply to such submission within 10 days. The court ordered further proceedings on the amount of penalty; however, by inadvertence the petitioner overlooked that portion of the order and she, being unaware of the hearing, was absent. At the hearing, an attorney for Connecticut Yankee submitted documents in support of its claim for attorney's fees. The district court awarded the sum of $171,546.80. The petitioner moved for reconsideration and to vacate the order as being without factual justification, beyond the jurisdiction of the court and beyond her means to pay. The motion was denied.

Apart from imposing the monetary penalty, the district court, while professing it would decline to issue further specific orders for the time being, imposed a functional prior restraint against petitioner's future letter writing or appearance at public proceedings of Haddam land use agencies. At hearing on July 1, 2002, the district court warned that any future participation in public proceedings of the wetlands commission would expose the petitioner to the prospect of further contempt citations.

The petitioner appealed the contempt order to the Court of the Appeals for the Second Circuit.[6] The Court of Appeals affirmed in its Summary Order issued on July

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[6] Petitioner's appeal was consolidated with appeals she instituted on behalf of her clients from decisions of the district court, including its decision denying their motions to intervene in Connecticut Yankee and its dismissal of *Egri* on a summary judgment motion. The Court of Appeals affirmed all orders of the district court in its Summary Order, a1, and it denied a petition for rehearing. Egri et al. have not appealed further.

1, 2003. The petitioner petitioned for rehearing, which was denied on September 11, 2003.

Mindful of the district court's warning, the petitioner did not attend the public hearing on Connecticut Yankee's application for a wetlands permit to carry out new activities at the site, although her client, NORAD, had intervened in the proceedings under state law and was a party of record.

The petitioner subsequently moved the district court for permission to file additional actions alleging violations of state environmental laws and the National Historic Preservation Act. The district court denied each motion and the petitioner did not institute such actions.

While the appeal was pending, the Supreme Court released its decision in *Syngenta Crop Protection v. Henson*, 537 U.S. 28, on November 5, 2002, in which it declared that the All Writs Act does not provide an independent basis for federal jurisdiction for removal of state actions to federal court in the absence of another basis for federal jurisdiction. The petitioner filed motions to remand *Egri*, *NORAD* and *Warmsley* to the state court. On , the district court granted all motions. Connecticut Yankee did not object to the remand of *NORAD* and *Warmsley*. However, it moved the district court to reconsider its remand of *Egri* and the district court granted the motion and ordered *Egri* to remain in the district court. Connecticut argued that the district court possessed federal question jurisdiction over *Egri* because it originally alleged a First Amendment cause of action, although the *Egri* plaintiffs deleted the First Amendment claim prior to the March 15, 2002 hearing. The petitioner moved for an award of costs and attorney's fees based on the

improper removal of *NORAD* and *Warmsley*. The district court denied the motion.[7]

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[7] Shortly after *Warmsley's* remand, the petitioner noticed the deposition of John W. Shannahan, Director of the Connecticut Historical Commission who had initiated the nomination of the Venture Smith site to the National Register of Historic Places. Connecticut Yankee obtained an order to quash the deposition in the state court and moved for contempt again in the district court. On July 1, 2003, the district court found the petitioner in contempt of court and in violation of the Order Granting Permanent Injunction, over her objection, for noticing the deposition of Mr. Shannahan in *Warmsley* after it was remanded to the state court because of the absence of federal jurisdiction. Apart from ordering the petitioner to pay Connecticut Yankee $2,500, the district court ordered the petitioner to withdraw the suit forthwith from the state court docket. The order appears to conflict with the governing statute, 28 U.S.C. §1447(c), which provides as follows:

> If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. **The State court may thereupon proceed with such case. [Emphasis added.]**

28 U.S.C. §1447 divests the federal court of jurisdiction upon the entry of its remand order. *In re Katherine Susan Lowe*, 102 F.3d 731, 735 (4th Cir. 1996).The federal district court is completely divested of jurisdiction once it mails a certified copy of the order to the clerk of the state court. *Hunt v. Acromed Corporation*, 961 F.2d 1079, 1081 (3rd Cir. 1992). And *see* 1A J. Moore & B. Ringle, *Moore's Federal Practice* para. 0.169[2.-1], at 697 (2d ed. 1983). It is axiomatic that remanding a case to state court terminates the jurisdiction of a federal district court over that case. *United States v. Rice*, 327 U.S. 742 (1946).

The petitioner promptly withdrew *Warmsley* from the docket under protest. did so with reservation. An appeal from such order is pending in the Court of Appeals for the Second Circuit.

REASONS FOR GRANTING THE WRIT

1. In holding that a district court is empowered, pursuant to the All Writs Act, 28 U.S.C. § 1651, to issue an injunction order to a nonparty to enforce a privately negotiated consent decree which was not adjudicated on the merits, the Court of Appeals Order violates the petitioner's fundamental due process rights and is in direct conflict with decisions of the Sixth Circuit. The Sixth Circuit has correctly held that only consent judgments that impose obligations pursuant to court adjudication can serve as the basis for an injunction order to a nonparty under the All Writs Act. Review is warranted to correct the Second Circuit's holding to the contrary and to promote uniformithy on this issue within the circuits.

2. The All Writs Act, 28 U.S.C. 1651, does not empower a district court to enter contempt orders against a non-party attorney for engaging in protected free speech, nor does it empower a district court to impose prior restraints of speech; the district court orders conflict with the Supreme Court's time-honored First Amendment doctrines. Nevertheless, the Court of Appeals affirmed the district court's contempt orders imposing severe monetary sanctions upon petitioner attorney for engaging in classic free speech activities, including participating in municipal land-use proceedings before a wetland commission and writing letters to municipal wetlands officials on behalf of her clients on issues of grave importance to the community. Review is warranted to correct the Second Circuit's unprecedented decision.

3. When it imposed a $171,546.80 punitive contempt sanction against the petitioner attorney personally, the district court committed plain error when it abused its discretion by failing to afford due process safeguards

mandated by *International Union, United Mine Workers v. Bagwell*, 512 U.S. 821(1994). Bagwell dictates that "criminal penalties may not be imposed on someone who has not been afforded the protections that the Constitution requires of such criminal proceedings." *Id.* at 2556. Such protections include disinterested factfinding, evenhanded adjudication and a criminal jury trial, *Id.* at 2562, all of which were absent from the proceedings below.

DISCUSSION

1. In holding that a district court is empowered, pursuant to the All Writs Act, 28 U.S.C. § 1651, to issue an injunction order to a nonparty to enforce a privately negotiated consent decree which was not adjudicated on the merits, the Court of Appeals Order violates the petitioner's federal due process rights and is in direct conflict with decisions of the Sixth Circuit. The Sixth Circuit has held that only consent judgments that impose obligations pursuant to court adjudication can serve as the basis for an injunction order to a nonparty under the All Writs Act.

The All Writs Act states that "the Supreme Court and all courts established by act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

The Act permits courts to issue orders to nonparties in certain situations. See *United States v. New York Tel. Co.*, 434 U.S.159, 174 (1977). ("The power conferred by the Act extends, under appropriate circumstances, to persons who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper adminis-

tration of justice, and encompasses even those who have not taken any affirmative action to hinder justice.")

However, as the Sixth Circuit recently declared, "courts may issue orders to nonparties only when acting pursuant to a legal authority," citing *Syngenta Crop Protection v. Henson*, 537 U.S. 28 (finding that the All Writs Act could not justify a removal order when there was no basis for removal jurisdiction), *United States v. City of Detroit*, 329 F.3d 515, 523 (Sixth Cir. 2003).

While some consent judgments impose obligations pursuant to law, and some impose obligations pursuant to contract between the parties, *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 519 (1986), "only consent judgments that impose obligations pursuant to law can serve as the basis for an injunctive order to a nonparty under the All Writs Act." *City of Detroit*, 329 F.3d at 523.

The Sixth Circuit explained in *City of Detroit* that, since the All Writs Act makes no distinction between consent judgments and court orders, "the relevant distinction is between writs issued in aid of the court's jurisdiction pursuant to a legal obligation and writs issued in aid of the court's jurisdiction pursuant to private contract." Id.

In *City of Detroit*, the Sixth Circuit considered the district court's jurisdiction under the All Writs Act to issue an injunctive order compelling the U.S. Army Corps of Engineers, a nonparty, to accept certain dredged material for disposal. Reviewing the history of the case, the Sixth Circuit concluded that the district court's sanctioning of the consent agreement "was clearly more than just a 'stamp of approval.' Rather, the consent judgment operated as broadly as a ruling after a full trial. Therefore,

the consent judgment was a sufficient basis for invoking the All Writs Act." 329 F.3d at 523.

Similarly, the Sixth Circuit ruled in *Grand Traverse Band of Ottawa & Chippewa Indians v. Director, Michigan Department of Natural Resources*, 141 F.3d 635, 642 (1998), that the consent order in question was adopted pursuant to litigation which determined a material issue on the merits and thus, pursuant to the All Writs Act, the district court had jurisdiction to impose injunctive orders on a nonparty.

In contrast, the consent decree by which the parties in *Connecticut Yankee* stipulated to settle the suit was strictly a private contract. The district court did not conduct proceedings in the case and took no evidence. Its endorsement of the stipulation, entered just two months after the suit was instituted, was a *pro forma* act. The district court's endorsement of the stipulation did not impose obligations pursuant to law.

Thus, the district court lacked All Writs Act jurisdiction over petitioner to enforce the consent decree against her and it lacked jurisdiction to find her in contempt for violating its injunction to protect the "integrity" of the consent decree. The Order Granting Permanent Injunction is a void order. An attorney's disobedience of a void order of court is not punishable as contempt of court. 17 A.Jur.2d Contempt § 95.

The petitioner presented this argument to the Second Circuit, relying on its decision in *Association for Retarded Citizens v. Thorne*, 30 F.3d 367 (2d Cir. 1994), cert. den. 513 U.S. 1079.

In *Association for Retarded Citizens*, the Second Circuit ruled that a voluntarily assumed consent judgment does not give rise to a legal obligation authorizing the

court to impose or enforce obligations on nonparties, as follows:

> Where a district court enters a privately-negotiated consent decree, it does not determine that the obligations assumed by the parties are required by law. Indeed, consent decrees often impose rights and obligations greater than those imposed by law. Because the terms of the consent decree were voluntarily assumed rather than legally imposed, there is no basis for extending the negotiated outcome to a nonparty. While a district court has authority to enforce a judicially-approved consent decree against the parties to it, **a district court that enforces a decree against a nonparty acts beyond its jurisdiction and thus** International **beyond the scope of the All Writs Act**. [Emphasis added.]

Association for Retarded Citizens, 30 F.3d at 370 (citation omitted).

The Court of Appeals rejected petitioner's argument in reliance on *Association of Retarded Citizens, citing its decision in United States v. International Board of Teamsters*, 266 F.3d 45, 50 (2d Cir. 2001). Summary Order, Appendix at 12a.

In *International Brotherhood of Teamsters*, the Court of Appeals ostensibly reaffirmed its holding in *Association for Retarded Citizens*, 266 F.3d at 50, but ruled nevertheless that the All-Writs Act empowered the district court to enter injunction orders against non-parties, "not to bind [such non-parties] to the consent decree, but to enjoin them from acts that would frustrate the consent decree's operation on parties that are bound to the decree." 266 F.3d at 50.

The Second Circuit's reliance on *International Brotherhood of Teamsters* to defeat petitioner's challenge to

All Writs Act jurisdiction is misplaced. First, under *Association for Retarded Citizens*, judicial conduct constituting adjudication on the merits is still required to create an obligation under law, not private contract, to justify All Writs Act application. Second, a nonparty is obviously bound to the consent decree if enjoined from conduct which would frustrate its operation. The Second Circuit's distinction is a semantical distinction without a difference.

Moreover, *International Brotherhood of Teamsters* involves exceptional and unique circumstances. There, a consent decree resolved "massive litigation" involving "scores of lawsuits" brought by the government to root out the corrupt influence of organized crime in the International Brotherhood of Teamsters. 266 F.3d at 48. Significantly, the appellants as members of the union were subject to the consent decree when it was entered and "thereby [were] within the court's jurisdiction." 266 F.3d at 50.

The facts in *International Brotherhood of Teamsters* thus contrast sharply with the facts in the *Connecticut Yankee* case. *Connecticut Yankee* was instituted by a private company, not the government, to obtain a building permit. The suit was settled just two months after it was instituted, when Connecticut Yankee agreed to pay the town $10 million to obtain the building permit. The district court conducted no proceedings in the case and took no evidence. It endorsed the private settlement *pro forma*. The settlement did not rectify a wrong; as asserted herein, infra 9, the settlement in *Connecticut Yankee* actually promoted lawlessness in the town's regulation of land use. In contrast with *Teamsters*, petitioner and her clients were never parties to the Connecticut Yankee case; indeed, the district court denied petitioner's clients' motions to intervene as parties.

Moreover, in this case, neither petitioner nor her clients consented to the consent decree.

"The general rule is commonsensical: a party must consent to a consent decree before that decree can be enforced against that party." *Madison Square Garden Boxing, Inc. v. Shavers*, 562 F.2d 141, 143 (2d Cir. 1977).

This argument finds support in decisions of the Sixth and Seventh Circuits as well as longstanding Supreme Court precedent.

As the Seventh Circuit explained in *Citizens Electric Corp. v. Bituminous Fire & Marine Ins. Co.*, 68 F.3d 1016, 1022 (7th Cir. 1995), a privately negotiated consent decree is only enforceable against the parties who give their consent, because the force of the consent judgment rests ultimately on the contract rather than on a determination that the law requires what the judgment provides; *People Who Care v. Rockford Board of Education*, 961 F.2d 1335 (7th Cir. 1992).

This view accords with Supreme Court precedent. Such a decree is not a proper vehicle for extinguishing the legal rights and duties of third parties, nor may it impose obligations on unwilling third parties. *Local No. 93, International Association of Firefighters v. Cleveland*, 478 U.S. 501, 529 (1986). And *see Martin v. Wilks*, 490 U.S. 755, 762 (1989); *United States v. Ward Baking Co.*, 376 U.S. 327 (1964); *Hughes v. U.S.*, 342 U.S. 353 (1952). Therefore, only the parties to the decree can be held in contempt of court for failure to comply with its terms. See *United States v. Armour & Co.*, 402 U.S. 673 at 676-677 (1971). The petitioner, a nonparty to a consent decree, cannot be held in contempt for failure to comply with its terms through enforcement of the Order Granting Permanent Injunction.

2. The All Writs Act, 28 U.S.C. 1651, does not empower a district court to enter contempt orders against a non-party attorney for engaging in protected free speech, nor does it empower a district court to impose prior restraints of speech; the district court orders conflict with the Supreme Court's time-honored First Amendment doctrines.

In its two centuries of existence, the Supreme Court has never upheld a prior restraint on pure speech. *In the Matter of Providence Journal Co.*, 820 F.2d 1342, 1348 (1st Cir. 1986).

Yet, under the guise of the All Writs Act, the district court in this case imposed an extraordinary, permanent, functional equivalent of a prior restraint on the speech of petitioner, an attorney advocating a client's position in municipal land-use proceedings, on an issue of grave concern to the community.

Under the guise of the All Writs Act, the district court imposed a functional prior restraint on the petitioner so that she could not attend a public hearing of a municipal wetlands agency on behalf of her client, a party of record with a right of intervention, without suffering the risk of a contempt citation and draconian monetary penalties. The restraint order extends to appearing at a public hearing to consider a wetlands application by the respondent and even writing letters to public officials.

Even when confronted with a matter of high national security, see, e.g., *New York Times v. Sullivan*, 376 U.S. 254 (1964), the Supreme Court refused to uphold a prior restraint in a case involving a newspaper publication. In his concurring opinion, Justice Stewart noted that a prior restraint upon publication was improper absent proof that publication "will surely result in direct, immediate and irreparable damage to our Nation or our people."

While the All Writs Act empowers federal courts to issue "all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law," it does not authorize conduct which violates the First Amendment and due process rights of non-parties. Such orders are not "appropriate" and they are inconsistent with binding "principles of law." Put another way, the All Writs Act does not trump the First Amendment and it does not authorize prior restraints such as imposed by the district court.

As a general rule, speech on any matter of political, social or other concern to the community is protected by the First Amendment. *Connick v. Myers*, 461 U.S. 138, 148 (1983). Any regulation of speech in a traditional public forum is 'subject to the highest scrutiny.' *International Soc. For Krishna Consciousness, Inc.v. Lee*, 505 U.S. 672, 678 (1992).

Only a compelling state purpose—which is absent here—would allow the restrictions placed by the district court on petitioner's right to free speech to stand.

The district court's threat to find the petitioner in contempt prospectively, should she continue to appear at public hearings or write letters to public officials, is constitutionally disallowed.

"When a prior restraint takes the form of a court-issued injunction, the risk of infringing on speech protected under the First Amendment increases." *Metropolitan Opera Association v. Local 100*, 239 F.3d 172, 176, (2d Cir. 2001), citing *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 764 (1994) ("Injunctions . . . carry greater risks of censorship and discriminatory application than do general ordinances.") . . . ("If it can be said that a threat of criminal or civil sanctions after publication

'chills' speech, [a] prior restraint 'freezes' it, at least for the time." *Nebraska Press Ass'n*, supra 559.)

"Prior restraints on speech bear a heavy presumption of unconstitutionality because they are 'the most serious and the least tolerable infringements on First Amendment rights.' " *Nebraska Press Association v. Stuart*, 427 U.S. 539, 559 (1975).

Indeed, the First Circuit has held that a party subject to an order that constitutes a transparently invalid prior restraint on pure speech may challenge the order by violating it. *In the Matter of Providence Journal Co.*, 820 F.2d 1342 (1st Cir. 1986). A transparently invalid order cannot form the basis of a contempt citation. See 3 Wright, Federal Practice & Procedure § 702 at 815 n.17 (1982). Nevertheless, the petitioner did not knowingly violate the district court's Order Granting Permanent Injunction: the order lacks specificity to put an individual on notice that its rights of free speech have been seriously curbed.

A fundamental requirement of due process is that a statute must clearly delineate the conduct it proscribes. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). When First Amendment freedoms are at stake, an even greater degree of specificity and clarity is required. *NAACP v. Button*, 371 U.S. 415, 432-33 (1963).

However, any attempt to order the petitioner to absent herself from a public hearing on a land-use application or from letter-writing to pubic officials would not survive strict scrutiny analysis here.

It cannot be disputed that public hearing in a statutory land-use proceeding must provide an opportunity for both proponents and opponents of an application to participate. See, e.g., *Connecticut Land Use Law and Practice*, Section 203. ("Standard Agency Procedure for

Public Hearings"), Robert A. Fuller, West Publishing (Following the applicant's presentation, "opponents of the application are allowed to make statements and presentations against it or to ask questions of the applicant and its representatives.")

The petitioner's conduct, regarded by the district court as willfully defiant of its Order Granting Permanent Injunction, was nothing more than classic, time-honored, constitutionally sacrosanct engagement in the exercise of free speech on matters of public importance. The district court sought to gag and stifle the Haddam community by gagging and stifling the petitioner. Its orders impermissibly infringed upon the First Amendment.

3. When it imposed a $171,546.80 punitive contempt sanction against the petitioner attorney personally, the district court committed plain error when it abused its discretion by failing to afford due process safeguards mandated by *International Union, United Mine Workers v. Bagwell*, 512 U.S. 821(1994)

The Second Circuit Court of Appeals correctly observed that "[a] district court's finding of contempt is reviewed for abuse of discretion." Summary Order, 16a. It also correctly observed that a district court's "power to regulate out-of-court behavior is not unbridled." *Id.* It further stated, without articulating whether the contempt sanction of $171,546.80 personally imposed on Ms. Burton was a criminal contempt sanction or a civil contempt sanction, that "a contempt holding will fall unless the order violated by the contemnor is clear and unambiguous, the proof of non-compliance is clear and convincing, and the contemnor was not reasonably diligent in attempting to comply." *Id.* at 15a-16a. This was the analysis applied in determining that the district court did not abuse its discretion in holding that the petitioner was in contempt. *Id.*

While the standard of review is the abuse of discretion standard, various due process protections are afforded alleged contemnors and these protections must inform the discretionary decision-making function. "A court must . . . exercise caution in invoking its inherent powers, and it must comply with the mandates of due process, both in determining that the requisite bad faith exists and in assessing fees." *Chambers v. NASCO, Inc.*, 501 U.S. 32 at 50 (1991). There are different due process protections afforded one who is in civil contempt and one who is in criminal contempt. Thus, if because of the excessively high amount and because there is no means of purging herself from being in contempt, a proper constitutional analysis demonstrates that the petitioner has sustained a criminal contempt sanction in a federal civil action—the trial court abused its discretion because it applied a civil contempt analysis and standard to what is actually a criminal contempt sanction. As is well known, *"[a] district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." Cooter & Gell. v. Hartmarx Corp.*, 496 U.S. 384 at 405 (1990) (emphasis added).

The leading Supreme Court decision regarding the distinctions between civil and criminal contempts is *International Union, United Mine Workers v. Bagwell*, 114 S.Ct. 2552, 129 L.Ed. 2d 642 (1994). *Bagwell*, quoting *Hicks v. Feiock*, noted that, "criminal penalties may not be imposed on someone who has not been afforded the protections that the Constitution requires of such criminal proceedings." *Id.* at 2556, quoting *Hicks*, 485 U.S. 624, 632, 99 L. Ed. 2d 721, 108 S. Ct. 1423 (1988). In reviewing the history of so-called "coercive civil contempt fines" it was observed that "a relatively unlimited judicial power to impose noncompensatory fines" had arisen in both federal and state courts since 1947. *Bag-*

well at 2559. The central issue in *Bagwell* also applies here—"what procedural protections are due before any particular contempt penalty may be imposed." *Id.* at 2559. A civil contempt sanction is viewed as "non-punitive and avoidable" i.e. the contemnor may purge herself via compliance, whereas a criminal contempt sanction, "by contrast, is punitive, [imposed] to vindicate the authority of the court." *Id.* at 2559 and 2566. Thus, Justice Ginsburg noted, ". . . the criminal contemnor has 'done that which he has been commanded not to do' . . ." and "the criminal contemnor's disobedience is past, a 'completed act' . . . a deed no sanction can undo." (Quoting *Gompers v. Bucks & Range Co.*, 221 U.S. 418, 441-442 (1911). Applying these precepts to the instant matter, it is obvious that the $171, 000 fine is irreversible and that the contemnor cannot purge herself of it. It is a criminal contempt sanction.

Bagwell recognizes that, "[f]or a discrete category of indirect contempts, however, civil procedural protections may be insufficient. *Contempts involving out-of-court disobedience to complex injunctions often require elaborate and reliable factfinding." Id.* at 2560, emphasis added. In the instant matter, the petitioner attempted to call witnesses to prove why she was not in contempt. However, the district court did not allow the petitioner to call various witnesses to testify. It is apparent from the record that the due process afforded the petitioner was nowhere near the due process mandates of criminal trials. Proof had to be established beyond a reasonable doubt. It was not. The alleged contemnor should have been afforded a jury trial. She was not. The petitioner had the Fourth and Fourteenth Amendment rights to call and examine witnesses. She was prevented from doing so. *Bagwell* completely controls. In *Bagwell* it was noted that the "trial court levied contempt fines for widespread ongoing, out-of-court violations of a complex injunction.

In so doing, *the court effectively policed petitioner's compliance with an entire code of conduct that the court itself imposed." Id.* at 2562 (emphasis added). The very same thing happened here! As was held in *Bagwell*, "[u]nder such circumstances, disinterested factfinding and even-handed adjudication were essential, and petitioners were entitled to a criminal jury trial." *Id.* at 2562. Accordingly, in reliance on *Bagwell*, the punitive contempt fine imposed here was *"criminal and constitutionally could not be imposed absent a jury trial." Id.* at 2563, (emphasis added).

Although the petitioner did not claim that the district court was required to conduct the contempt hearing as a *criminal* contempt hearing, prior to the issuance of the exorbitant fine, the petitioner had no way of knowing the sanction would be irreversible and so punitive. In her petition for rehearing before the United States Court of Appeals, the petitioner did argue that that body had "dismissed . . . without merit" her argument "that she lacked the wherewithal to pay a $171,546.80 monetary penalty." She also argued that this was "crippling for a sole practitioner acting *pro bono*." (*Id.*) She also argued that the sanction was "Draconian." *Id.* In April of this year, the Supreme Court noted in *State Farm Mutual Automobile Insurance Company v. Campbell*, that, "[t]he Due Process Clause prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor." 123 S. Ct. 1513, 1519 155 L. Ed. 2d 585, 600 (2003). (Although she is a contemnor and not a tortfeasor, it is a trivial distinction for constitutional purposes.) The punishment imposed is "grossly excessive" and the district court made no findings about the petitioner's ability to satisfy the contempt order. Such a punitive amount should not be allowed to stand. Such severe monetary penalties have been imposed without regard to the amount of petitioner's financial resources and the consequent seri-

ousness of the burden to her, although such consideration is mandatory. *United States v. United Mine Workers of America*, 330 U.S. 258, 304 (1947).

Although the due process rights violation stemming from the lower court's failure to afford criminal trial safeguards to the petitioner in a criminal contempt proceeding was not previously argued, the petitioner claims reviewability pursuant to *United States v. Olano,* 507 U.S. 725, 732-37 (1993). Under the *Olano* test, "before an appellate court can correct an error not raised at trial, there must be (1) 'error,' (2) that is 'plain,' and (3) that 'affect[s] substantial rights." (*Olano*, 507 U.S. at 732.) These criteria are met.

CONCLUSION

The decision below affirmed a $171,546.80 punitive contempt sanction against the petitioner attorney personally for engaging in First Amendment-protected activities and litigation over which the federal court admittedly lacks subject-matter jurisdiction, *NORAD* and *Warmsley*. The decision affirmed the authority of the All Writs Act to bind petitioner, a nonparty, to a private consent decree to which she did not consent and which the district court did not adjudicate, and implementation of which has promoted lawlessness in land-use regulation in the Town of Haddam. The Court of Appeals decisions are in clear conflict with decisions of other circuits and of this Court and deprive the petitioner of rudimentary due process. The Court of Appeals erred in not reversing the district court and vacating the contempt orders.

Moreover, given the crippling effects of the sanction on petitioner, the Court of Appeals committed plain error when it abused its discretion by failing to afford the plaintiff due process safeguards mandated by *Interna-*

tional Union, United Mine Workers v. Bagwell, 512 U.S. 821(1994), including a trial by jury.

It is respectfully submitted that the petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 02-7227
Filed July 1, 2003

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 1st day of July, two thousand and three.

PRESENT:

RALPH K. WINTER
JOSEPH M. MCLAUGHLIN
JOSÉ A. CABRANES
Circuit Judges.

IN RE ANDREW J. EGRI, NEIL W. SHERIDAN, JOHN D. KARLE III, CONNECTICUT RIVER WATERSHED COUNCIL, and STANFORD BRAINERD,

Appellants,

CONNECTICUT YANKEE ATOMIC POWER CO.

Plaintiff-Appellee,

—v.—

TOWN OF HADDAM, TOWN OF HADDAM BOARD OF SELECTMEN, CYNTHIA WILLIAMS, Town of Haddam Zoning Enforcement Officer, and ALAN PASKEWICH, Town of Haddam Building Official,

Defendants-Appellees.

No. 02-7653, No. 02-7703

IN RE ANDREW J. EGRI, NEIL W. SHERIDAN, JOHN D. KARLE III, CONNECTICUT RIVER WATERSHED COUNCIL, and STANFORD BRAINERD,

Appellants,

CONNECTICUT YANKEE ATOMIC POWER CO.,

Plaintiff-Appellee,

—v.—

TOWN OF HADDAM, TOWN OF HADDAM BOARD OF SELECTMEN, CYNTHIA WILLIAMS, Town of Haddam

Zoning Enforcement Officer, and ALAN PASKEWICH, Town of Haddam Building Official,

Defendants-Appellees.

No. 02-7751

ANDREW J. EGRI, EDWARD W. MUNSTER, and NEIGHBORS OPPOSED TO RESIDENTIAL ATOMIC DUMPS,

Plaintiffs-Appellants,

—v.—

CONNECTICUT YANKEE ATOMIC POWER CO., TOWN OF HADDAM BOARD OF SELECTMEN, and ALAN PASKEWICH, Town of Haddam Building Official,

Defendants-Appellees,

THOMAS R. GERARDE, DAVID WARMSLEY, DOUGLAS R. JONES, CONNECTICUT RIVER WATERSHED COUNCIL, and NEIL W. SHERIDAN,

Movants.

No. 02-9020

IN RE NANCY BURTON,

Contemnor-Appellant.

ANDREW EGRI, EDWARD W. MUNSTER, and NEIGHBORS OPPOSED TO RESIDENTIAL ATOMIC DUMPS,

Plaintiffs-Appellants,

—v.—

CONNECTICUT YANKEE ATOMIC POWER CO., TOWN OF HADDAM BOARD OF SELECTMEN, and ALAN PASKEWICH, Town of Haddam Building Official,

Defendants-Appellees,

THOMAS R. GERARDE, DAVID WARMSLEY, DOUGLAS R. JONES, CONNECTICUT RIVER WATERSHED COUNCIL, and NEIL W. SHERIDAN,

Movants.

APPEARING FOR APPELLANTS:

NANCY BURTON, Redding Ridge, CT.

APPEARING FOR APPELLEES:

ALLAN B. TAYLOR (John B. Nolan, of *counsel)*, Day, Berry & Howard LLP, Hartford, CT, *for Connecticut Yankee Atomic Power Co.*

THOMAS R. GERARDE (John J. Radshaw, III, *of counsel)*, Hartford, CT, *for Town of Haddam.*

UPON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgments of said District Court be and hereby are **AFFIRMED**.

All of the related appeals consolidated here were filed by attorney Nancy Burton on behalf of clients seeking to challenge a consent agreement entered into between Connecticut Yankee Atomic Power Company ("Connecticut Yankee") and the Town of Haddam ("Town"). Because all of the five consolidated appeals arose from related proceedings before the district court, this Court has chosen to consider them together.

These cases arise from Connecticut Yankee's plan to transfer spent nuclear fuel and other radioactive waste to a site to be constructed on property in the Town of Haddam. In November 2001, Connecticut Yankee brought suit against the Town for injunctive and monetary relief, seeking to compel the Town to allow Connecticut Yankee to construct an Independent Spent Fuel Storage Installation ("ISFSI") on a portion of its property that the Town had zoned for residential use only.[1] *See Connecticut Yankee Atomic Power Co. v. Town of Haddam*, No. 02-cv-2178 (D. Conn.).

The parties entered settlement negotiations in December 2001, with the Town represented by three Selectmen and the Town's counsel. On January 22 & 23, 2002, the Selectmen held public hearings to inform town residents of the proposed settlement, and, following these meetings, entered into the agreement. The agreement was memorialized by a district court order entered on January 29, 2002. By its terms, the agreement provided that

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[1] The dismissal of a previous action brought by Connecticut Yankee seeking the same relief was affirmed by this Court in 2001 because it was unripe; at that time, Connecticut Yankee had not yet applied for a building permit from the Town. *See Connecticut Yankee Atomic Power Co. v. Town of Haddam Planning & Zoning Comm'n*, Docket Nos. 01-7737 & 01-7867, 2001 WL 1167816 (2d Cir. Oct. 1, 2001). Connecticut Yankee commenced the underlying action here after applying for a building permit from the Town and waiting 7 months without receiving a decision on that application.

"Defendants consent to entry by [the district court] of a permanent injunction enjoining Defendants, and all other persons acting in concert with them or pursuant to their direction, from acting in any way to prevent, impede, interfere with or delay Connecticut Yankee's construction, implementation, or operation of the ISFSI, and such injunction is hereby ordered."

On February 27, 2002, Burton, on behalf of Egri, a non-party resident of the Town, filed motions in district court to intervene in the suit and for reconsideration of the consent order. The following day, Burton filed a notice of appeal from the consent order itself naming Egri as the appellant. This Court opened No. 02-7227 for that appeal.

In the following days, Burton filed motions seeking the same relief on behalf of several other individuals and the Connecticut River Watershed Council. After a hearing, the district court denied all of the motions to intervene and for reconsideration as untimely, noting that, despite notice of the underlying lawsuit from its inception, the movants did not seek to intervene in the suit until well after the parties had reached a settlement. Later, the court denied a motion for reconsideration of the denial of the motion to intervene. Two notices of appeal were filed from these various orders, and this Court opened Docket Nos. 02-7653 and 02-7703 for the appeals.

In addition to the various federal court filings, on February 27, 2002, Burton, on behalf of Egri, town resident Edward Munster, and an informal organization known as Neighbors Opposed to Residential Atomic Dumps ("NORAD"), filed a complaint in Connecticut Superior Court against Connecticut Yankee and various town officials, seeking to have the settlement declared "null and void and of no legal effect." The complaint

alleged causes of action based on Connecticut state law, Town laws, and the First Amendment. Connecticut Yankee removed that action to federal court and moved for a temporary restraining order ("TRO") to prevent the plaintiffs from taking any further action challenging the validity of, or delaying, preventing, or interfering with Connecticut Yankee's construction of the ISFSI, except through appeal of the district court's orders in the underlying action.

The district court granted the TRO and held a hearing to consider a subsequent motion by Connecticut Yankee and the Town seeking a permanent injunction. Thereafter, in March 2002, the district court granted the permanent injunction, finding that Connecticut Yankee would suffer irreparable harm if the injunction did not issue and that any further actions challenging the validity of the consent order in other judicial fora would violate the terms of the order itself and undermine the district court's jurisdiction in the underlying action. The permanent injunction prohibited the plaintiffs, their attorneys, and all persons with notice of the order from seeking "any judgment or administrative ruling that would invalidate or otherwise interfere with implementation of [the settlement order] . . . other than by direct appeal of this Court's Order or other filings in this action or in [the underlying action]." The district court based its jurisdiction to grant the permanent injunction on the All Writs Act, 28 U.S.C. § 1651.

Thereafter, the district court granted summary judgment in favor of the defendants on the grounds that none of the plaintiffs had standing to bring the case because none owned property adjacent to Connecticut Yankee's proposed building site, and none had made adequate assertions of particularized harm that would be suffered

if the ISFSI construction proceeded. With respect to the matter of jurisdiction, the court stated:

> Plaintiffs challenge the jurisdiction of the Court arguing that the All Writs Act cannot create jurisdiction where none previously existed. Plaintiffs are wrong in their understanding of both the All Writs Act and the underlying jurisdictional basis of this action. The All Writs Act gives this Court the authority to remove an action from state court in order to protect the integrity of its Order. Furthermore, jurisdiction would lie in this Court based on the claims alleged in the complaint. Those claims arise under federal law because each requires interpretation of and/or launches a challenge against the Agreement contained in the [consent order], which constitutes a "law of the United States" for purposes of 28 U.S.C. § 1331.

The plaintiffs filed a notice of appeal in July 2002 challenging both the permanent injunction and the summary judgment order. This Court opened Docket No. 02-7751 for the appeal.

Following the issuance of the permanent injunction discussed above, though prior to filing an appeal challenging that injunction, Burton commenced two additional suits against Connecticut Yankee in Connecticut Superior Court on behalf of other clients, seeking to enjoin construction of the ISFSI. She also wrote letters to the Town of Haddam Inland Wetlands Commission and appeared at a hearing before that body, asking it to revoke Connecticut Yankee's building permit. On the basis of these activities, Connecticut Yankee sought to have Burton declared in contempt of the district court's permanent injunction order. After a hearing, the district

court found that Burton had violated the permanent injunction and held her in contempt of court.

The district court scheduled a second hearing to determine the attorneys' fees to be paid by Burton as a sanction for her actions. Despite notice of the hearing, Burton failed to attend, though she did file a general objection to Connecticut Yankee's request for attorney's fees on the grounds that the district court lacked jurisdiction to order such fees, that an inadequate factual basis existed for awarding fees in the amount sought by Connecticut Yankee, and that she was unable to pay such fees. Following the hearing, the district court ordered Burton to pay fees and costs to Connecticut Yankee in the amount of $171,546.80. Burton filed a notice of appeal from the contempt order and the fee award, and this Court opened 02-9020 for that appeal.

Connecticut Yankee Atomic Power Co. v. Town of Haddam, Docket No. 02-7227

Egri has attempted to appeal from the district court's order memorializing the settlement between Connecticut Yankee and the Town. However, as a non-party to the suit below, Egri lacks standing to appeal. *See Marino v. Ortiz,* 484 U.S. 301, 304 (1988) (per curiam) (noting that appeal must ordinarily be filed by a party of record below). We have occasionally permitted appeals by those who, although not parties, have an interest affected by the action below. *See, e.g., United States v. Int'l Bhd. of Teamsters,* 931 F.2d 177, 183-84 (1991) (permitting non-party affiliates to appeal based on their contractual interests); *Martin-Trigona v. Shiff,* 702 F.2d 380, 386-87 (2d Cir. 1983) (permitting trustees to appeal). However, Egri has not demonstrated the integral involvement with the action below that is generally required to invoke this exception. Though Egri argues that, under Connecticut

statutory and common law, he has standing to bring this appeal based on his status as a Haddam resident and taxpayer, the provisions on which Egri relies are directed at the situation where, unlike here, a town is unrepresented in a court action; they do not independently confer appellate standing on a disgruntled town resident who is unsatisfied with the outcome of his elected representatives' handling of a lawsuit. *See, e.g., Union v. Crawford,* 19 Conn. 331, at *5 (1848); *cf. Nichols v. City of Ansonia*, 81 Conn. 229, 70 A. 636, 639 (1908) (noting the necessity of "special rules" to regulate individual citizens appearing on behalf of a town). Because Egri lacks standing to bring this appeal, we lack jurisdiction to hear it. *See Lerner v. Fleet Bank, N.A.*, 318 F.3d 113, 126 (2d Cir. 2003) ("Standing is a jurisdictional prerequisite to suit.").

Egri v. Connecticut Yankee Atomic Power Co., Docket Nos. 02-7653, 02-7703

These appeals address the issue of whether the district court properly denied motions on behalf of Egri, other citizens, and the Connecticut River Watershed Council to intervene in the underlying suit. A district court's denial of a motion to intervene is reviewed for abuse of discretion. *See In re Bank of New York Derivative Litigation,* 320 F.3d 291, 299 (2d Cir. 2003).

To intervene as a matter of right, an applicant must (1) timely move to intervene; (2) demonstrate his interest in the action; (3) show that his interest could be impaired by the disposition of the action; and (4) show that his interest is not adequately protected by the parties. *See* Fed. R. Civ. P. 24(a)(2); *New York News, Inc. v. Kheel*, 972 F.2d 482, 485 (2d Cir. 1992). A motion to intervene may properly be denied if the applicant fails to satisfy any one of these four requirements; thus, an intervention

motion may be denied solely because it was untimely filed. *See Farmland Dairies v. Comm'r of the N.Y. State Dept. of Agric. & Mkts.*, 847 F.2d 1038, 1043 (2d Cir. 1988). A district court has discretion to evaluate the timeliness of a motion to intervene in light of "all the circumstances," including, generally, "(1) how long the applicant had notice of the interest before it made the motion to intervene; (2) prejudice to existing parties resulting from any delay; (3) prejudice to the applicant if the motion is denied; and (4) any unusual circumstances militating for or against a finding of timeliness." *United States v. Pitney Bowes, Inc.*, 25 F.3d 66, 70 (2d Cir. 1994).

Here, the district court denied the intervention motions after an extensive hearing at which it was established that the applicants' attorney knew of the underlying lawsuit from its inception and that the applicants themselves were aware of the lawsuit well before the intervention motions were filed. However, despite this knowledge, the applicants chose not to seek intervention until after a settlement between the parties had been reached and the district court's final order memorializing that agreement had been entered. In light of the applicants' delay in seeking intervention, the district court's decision to deny the intervention motions by reason of untimeliness was not an abuse of discretion.

Egri v. Connecticut Yankee, Docket No. 02-7751

The appellants challenge the district court's jurisdiction over their state law claims, contending that removal jurisdiction based on the All Writs Act was determined to be improper by the Supreme Court's decision in *Syngenta Crop Protection, Inc. v. Henson*, 537 U.S. 28 (2002), which held that the All Writs Act does not create an independent jurisdictional basis for removal.

However, because First Amendment claims were present on the face of the complaint at the time that it was removed into district court, the district court had independent subject matter jurisdiction over the case pursuant to 28 U.S.C. § 1331 at the time that it was removed. Given this independent jurisdictional basis for removing the action, the district court had authority to exercise supplemental jurisdiction over pendant state law claims, even after the First Amendment claims were withdrawn from the complaint. *See Parker v. Della Rocco,* 252 F.3d 663, 665-66 (2d Cir. 2001) (per curiam) (holding that, where a district court properly exercises removal jurisdiction, the court may continue to exercise supplemental jurisdiction over state law claims, even after dismissal of federal claims).

The appellants further contend that the district court did not have jurisdiction to craft a permanent injunction that could compel them, as non-parties to the underlying suit, to abide by the consent decree issued in that suit. Appellants principally rely on *Association for Retarded Citizens of Connecticut, Inc. v. Thorne,* 30 F.3d 367 (2d Cir. 1994), in which this Court held that the All Writs Act does not provide a jurisdictional basis for a district court to enforce the terms of a consent decree against non-parties to the decree. *Id.* at 370. *Association for Retarded Citizens* is inapposite here; unlike the district court in that case, here the district court "has sought not to bind appellants to the consent decree, but to enjoin them from acts that would frustrate the consent decree's operation on parties that are bound to the decree." *Int'l Bhd. of Teamsters,* 266 F.3d at 50. Similarly, the injunction issued by the district court in this case merely stipulated that that court was the proper forum in which to mount challenges to the consent decree; it did not pur-

port to bind non-parties to the particular provisions of the decree itself.

Pursuant to the All Writs Act, a district court is authorized to bind non-parties where such action is necessary to preserve its ability to adjudicate proceedings already before it or to enforce its own prior decisions. *See In re Baldwin-United Corp.*, 770 F.2d 328, 338 (2d Cir. 1985). Thus, an injunction that merely seeks to enjoin behaviors that could frustrate the operation of a consent decree are authorized by the All Writs Act, even if the injunction operates against non-parties. *See Int'l Bhd. of Teamsters*, 266 F.3d at 50. Here, the permanent injunction challenged by the appellants was justified by the district court's need to protect the implementation of its prior order; it did not purport to force non-parties to abide by the terms of that order, except insofar as essential to the implementation of that order. Therefore, the district court had jurisdiction to issue the permanent injunction pursuant to the All Writs Act.

Turning to the propriety of the summary judgment order itself, we note that a district court's grant of summary judgment is reviewed *de novo*, resolving all ambiguities and drawing all factual inferences in favor of the non-moving party. *See Nationwide Life Ins. Co.* v. *Bankers Leasing Ass'n, Inc.*, 182 F.3d 157, 160 (2d Cir. 1999). Summary judgment is appropriate only if the moving party establishes that there exist no disputed issues of material fact, and that it is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56.

Here, the district court asserted two grounds for granting summary judgment in favor of defendants Connecticut Yankee and the Town: plaintiffs' failure to comply with the requirement of a Local Rule of the court, and plaintiffs' lack of standing to bring the asserted claims. *See Egri v. Connecticut Yankee Atomic*

Power Co., No. 3:02-cv-400(AHN) (D. Conn. June 20, 2002). Putting aside any issues relating to compliance with the Local Rule, the district court's grant of summary judgment against the appellants may be affirmed on the ground that the appellants lacked standing to bring their suit.

To satisfy the constitutional standing requirement, a plaintiff must demonstrate that he has suffered an injury-in-fact—that is, a concrete injury that affects the plaintiff in "a personal and individual way." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 & n.1 (1992). General status as a citizen or a taxpayer is insufficient to support a claim of improper application of the laws, without allegations of more particularized injury. *Id.* at 573-74; *see also Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 221-22 (1974).

Here, the appellants' complaint alleges, *inter alia*, that Connecticut Yankee and the Town unlawfully entered into an agreement with one another to authorize Connecticut Yankee's building permit without following the procedures mandated by state and local law. Aside from a general injury premised on their status as residents of Haddam, the complaint alleges that the proposed construction could subject appellants to "devaluation of their property as well as nuisance conditions directly attributable to construction and maintenance activities . . . such as noise, air pollution, water pollution, and heavy truck traffic." Compl. of Feb. 27, 2002 ¶ 21d. However, the appellants conceded at the March 15, 2002 hearing that their properties do not, in fact, adjoin the site of the proposed construction, which negates their claims of particularized harm. Tr. of Mar. 15, 2002 at 28-35. While this Court has previously found that a likelihood of exposure to emissions from a proposed facility will suffice to confer standing on a neighbor, even

one whose property does not adjoin the facility, *see LaFleur v. Whitman*, 300 F.3d 256, 270 (2d Cir. 2002), the appellants here have not alleged, as in *LaFleur*, that they will suffer any health injury as a result of the proposed construction. Their grievances are of the sort shared by all Haddam residents, rather than the "personal and individual" injuries required to establish standing. *See Lujan*, 504 U.S. at 573 n.1. Thus, the district court's order granting summary judgment to the defendants is affirmed.[2]

Egri v. Connecticut Yankee Atomic Power Co., Docket No. 02-9020

Burton seeks to challenge the district court's order finding her in contempt of court for violating its permanent injunction of March 15, 2002 by instituting two lawsuits in Connecticut state court seeking to prevent Connecticut Yankee's ISFSI construction, and by taking actions to institute agency proceedings that would prevent the ISFSI construction from proceeding. Burton did not appeal the permanent injunction when it was issued in March 2002; rather, she proceeded with the activities for which the district court held her in contempt and did not appeal the injunction itself until July 2002, as part of Docket No. 02-7751, above.

As this Court has explained:

> [A] party may not challenge a district court's order by violating it. Instead, he must move to vacate or modify the order, or seek relief in this Court. If he

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[2] Still outstanding in this appeal is Connecticut Yankee's request for sanctions against Burton based on her failure timely to file a brief and appendix in this case. Because Burton did file her brief and appendix within the time limits imposed by this Court's April 23, 2003 order, the outstanding motion for sanctions is denied.

> fails to do either, ignores the order, and is held in contempt, he may not challenge the order unless it was transparently invalid or exceeded the district court's jurisdiction.

United States v. Cutler, 58 F.3d 825, 832 (2d Cir. 1995). Here, the conduct that Burton engaged in which resulted in the district court's finding of contempt occurred prior to any attempt on her part to challenge the permanent injunction by means of appeal in this Court. Thus, she cannot challenge the district court's permanent injunction unless that order was invalid on its face or beyond the scope of the district court's jurisdiction. However, "to invoke the transparently invalid exception, . . . a defendant must make some good faith effort to seek emergency relief from the appellate court . . . , or show compelling circumstances, such as a need to act immediately, excusing the decision not to seek some kind of emergency relief." *Id.* (citations omitted). As discussed above, the injunction did not exceed the district court's jurisdiction. Furthermore, Burton made no effort to seek relief from the injunction from this Court until over three months after its issuance, nor has she alleged any compelling circumstances which would excuse her delay in seeking appellate review of that order. Thus, the underlying injunction cannot be challenged in this appeal from the order holding Burton in contempt of court.

A district court's finding of contempt is reviewed for abuse of discretion. *See United States v. Local 1804-1, Int'l Longshoremen's Assoc., AFL-CIO*, 44 F.3d 1091, 1095 (2d Cir. 1995). However, because a district court's power to regulate out-of-court behavior is not unbridled, "a contempt holding will fall unless the order violated by the contemnor is clear and unambiguous, the proof of non-compliance is clear and convincing, and the con-

temnor was not reasonably diligent in attempting to comply." *Id.* at 1096 (citations omitted).

Here, the district court's permanent injunction clearly and unambiguously stated that the order prohibited Burton, as attorney for the plaintiffs, "from seeking any judgment or administrative ruling that would invalidate or otherwise interfere with implementation of the [consent order] . . . other than by a direct appeal of this Court's Order or other filings in this action or in the Related Action." *Egri v. Connecticut Yankee Atomic Power Co.*, No. 3:02-cv-400(AHN) (D. Conn. Mar. 11, 2002). Burton conceded the clarity of this provision when she stated before the district court that the quoted provision "means exactly what it says." Tr. of June 20, 2002 at 28. However, she now argues that the language quoted above does not bar the behavior for which the district court found her to be in contempt. This argument is plainly without merit; the complaints in both state court lawsuits on which the contempt finding was based explicitly requested a halt to Connecticut Yankee's ISFSI construction activities. Similarly, Burton's activities before the Inland Wetlands Commission were directed at revoking Connecticut Yankee's construction permit. Thus, the district court did not abuse its discretion in holding Burton in contempt.

Burton also seeks to challenge the method by which the district court calculated the costs and fees that it charged to her as sanctions for her contemptuous behavior. However, she failed to appear below to challenge the calculation of fees sought by Connecticut Yankee, despite notice of the hearing at which the amount of sanctions was determined. Because Burton did not object to the district court's method of calculating fees in the proceeding below, she cannot now challenge the calculation on appeal. *See Cutler*, 58 F.3d at 835. Further-

more, insofar as Burton seeks to appeal those claims raised in the written objection to fees that she filed below, her claims are without merit. For the foregoing reasons, the orders of the district court are affirmed.

For the Court:
Roseann B. MacKechnie, Clerk

By: LUCILLE CARR

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

3:02CV400 (AHN)
Filed July 9, 2002

ANDREW J. EGRI, EDWARD MUNSTER and NEIGHBORS OPPOSED TO RESIDENTIAL ATOMIC DUMPS

—v.—

CONNECTICUT YANKEE ATOMIC POWER COMPANY, TOWN OF HADDAM BOARD OF SELECTMEN and ALAN PASKEWICH, In His Capacity as Town of Haddam Building Official

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ORDER OF CONTEMPT

Defendant Connecticut Yankee Atomic Power Company filed a Motion for Contempt against Attorney Nancy Burton, counsel to Plaintiffs in this matter and to other plaintiffs in related matters. The court held a contempt hearing on July 1, 2002, pursuant to which it found the following:

1. Attorney Burton represents Plaintiffs in *Warmsley, et al. v. Connecticut Yankee Atomic Power Company,* 3:02cv768(AHN), which seeks "[a] temporary and permanent injunction to enjoin

construction activities associated with the [Independent Spent Fuel Storage Installation] on lands once owned by Venture Smith."

2. Attorney Burton represents Plaintiffs in *Neighbors Opposed to Residential Atomic Dumps and Connecticut River Watershed Council v. Inland Wetlands Commission of the Town of Haddam and Connecticut Yankee Atomic Power Company,* 3:02cv1046(AHN), which seeks "1) a declaratory judgment that: a. the permit issued to CYAPO [sic] on August 29, 2000 is invalid; b. CYAPCo is proceeding to construct, a new road and an Independent Spent Fuel Storage Installation, both of which require a valid wetlands permit[,] without obtaining a valid wetlands permit; and 2) Mandatory injunctive relief that: a. enjoins all activities of CYAPo [sic] pursuant to the invalid wetlands permit; and b. requires CYAPCo to restore the site to the conditions existing *status quo ante*; and 3) Such further relief as the Court finds appropriate."

3. Attorney Burton has participated in proceedings before the Inland Wetlands Commission (the "Commission") and wrote various letters to the Commission and to specific individuals associated with the Commission seeking to impede construction of the ISFSI.

The Court finds that the above-described actions violate the Permanent Injunction (the "Injunction") entered by this court on March 15, 2002, specifically paragraph 3 which states: "Plaintiffs, their successors, assigns, agents and attorneys, and all persons with notice of the per-

manent injunction, are hereby permanently enjoined from seeking any judgment or administrative ruling that would invalidate or otherwise interfere with implementation of the Order, including the Building Permit issued thereunder, other than by a direct appeal of this Court's Order or other filings in this action or in the Related Action." The Court therefore finds Attorney Burton in contempt for violating the Permanent Injunction. Attorney Burton will pay the reasonable costs and expenses incurred by Connecticut Yankee related to Ms. Burton's actions in violation of the Permanent Injunction. The Court will conduct a hearing at 2:00 p.m. on July 22, 2002 in which Connecticut Yankee may offer evidence supporting its claim for fees and expenses and Attorney Burton will have an opportunity to object to the claimed fees and expenses.

SO ORDERED this 8th day of July, 2002 at Bridgeport, Connecticut.

ALAN H. NEVAS

Alan H. Nevas
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

3:02CV400(AHN)
Filed July 24, 2002

ANDREW J. EGRI, EDWARD MUNSTER and NEIGHBORS OPPOSED TO RESIDENTIAL ATOMIC DUMPS

—v.—

CONNECTICUT YANKEE ATOMIC POWER COMPANY, TOWN OF HADDAM BOARD OF SELECTMEN and ALAN PASKEWICH, In His Capacity as Town of Haddam Building Official

---

ORDER

On July 1, 2002, the Court found Nancy Burton to be in contempt for violating the Permanent Injunction entered by the Court on March 15, 2002. The Court ordered Attorney Burton to pay the reasonable costs and expenses incurred by Connecticut Yankee Atomic Power Company ("Connecticut Yankee") in conjunction with Attorney Burton's violations of the Permanent Injunction.

A hearing was held on July 22, 2002 during which Connecticut Yankee presented evidence in support of its

claim for fees and expenses.[1] After careful review of the evidence presented by Connecticut Yankee as well as the written objections of Attorney Burton, the Court orders Attorney Burton to pay Connecticut Yankee reasonable fees and expenses in the amount of $171,546.80.

SO ORDERED this 24th day of July, 2002, at Bridgeport, Connecticut.

ALAN H. NEVAS
Alan H. Nevas
United States District Judge

[1] The Order of Contempt indicated that Attorney Burton would have the opportunity to object to the claimed fees and expenses at a hearing on July 22, 2002. A calendar was also sent to the parties indicating the date and time of the hearing. Both documents were mailed to all counsel on July 10th, 2002. However, Attorney Burton failed to appear at this hearing.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No: 02-7227
Filed September 11, 2003

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 11th day of September two thousand three.

CONNECTICUT YANKEE

Appellee,

—v.—

TOWN OF HADDAM

Appellant.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Town of Haddam.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT:

ROSEANN B. MACKECHNIE, Clerk

By: ARTHUR M. MILLER
Arthur M. Miller,
Motions Staff Attorney

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CIVIL ACTION NO. 3:02CV400 (AHN)
March 11, 2002

ANDREW J. EGRI, EDWARD MUNSTER and NEIGHBORS OPPOSED TO RESIDENTIAL ATOMIC DUMPS

Plaintiffs,

—vs.—

CONNECTICUT YANKEE ATOMIC POWER COMPANY, TOWN OF HADDAM, TOWN OF HADDAM BOARD OF SELECTMEN and ALAN PASKEWICH, In His Capacity as Town of Haddam Building Official

Defendants.

ORDER GRANTING PERMANENT INJUNCTION

After a hearing was held on March 15, 2002, on the Motion of Defendant Connecticut Yankee Atomic Power Company ("Connecticut Yankee") for a Permanent Injunction at which the trial of the action on the merits was ordered to be advanced and consolidated with the hearing of the application for preliminary injunction and at which the parties were heard and had an opportunity to present witnesses and based on the evidence and arguments of the parties, I find that:

A. Issuance of the requested Permanent Injunction is necessary and appropriate in aid of this Court's jurisdiction in the related action, *Connecticut Yankee Atomic Power Company v. Town of Haddam et al.*, Civ. No. 3:01CV2178 (AHN) (the "Related Action"); and

B. The appeal by Plaintiff Andrew J. Egri (the "Appeal") to the Town of Haddam Building Board of Appeals (the "Building Board of Appeals") challenging the issuance of a building permit to Connecticut Yankee (the "Building Permit") will undermine this Court's jurisdiction inasmuch as the Building Permit was issued pursuant to this Court's Order on Consent of Parties (the "Order") dated January 29, 2002, in the Related Action;

C. Any hearing, adjudication or other action by the Board of Appeals or in any other administrative or judicial forum in connection with the Appeal would violate the Order, frustrate its implementation, or undermine this Court's jurisdiction;

D. Connecticut Yankee would suffer irreparable harm if the requested permanent injunction did not issue because it would suffer further delays in its ongoing decommissioning process;

E. Other actions challenging the validity of the Order (or any actions taken in accordance with the Order) in any other judicial or administrative forum would violate the Order, frustrate its implementation, or undermine this Court's jurisdiction in the Related Action;

F. Plaintiffs' claims regarding the Order lack merit;

G. The Town adequately represented the interests of its residents in the Related Action and in negotiating and agreeing to the Order;

H. A permanent injunction is necessary to ensure the integrity and finality of the Order, and to prevent frustration of its implementation; and

I. This Court has authority under the All Writs Act, 28 U.S.C. § 1651, to issue such relief as prayed for by Connecticut Yankee.

NOW, THEREFORE, it is hereby ORDERED that until further notice or order of the Court, that:

1. Plaintiff Andrew Egri is hereby permanently enjoined from prosecuting or proceeding with the Appeal, or from seeking any judgment or administrative ruling that would invalidate or otherwise interfere with implementation of the Building Permit;

2. The Town of Haddam and the Building Board of Appeals are hereby permanently enjoined from hearing, adjudicating or otherwise acting upon Mr. Egri's Appeal; and

3. Plaintiffs, their successors, assigns, agents and attorneys, and all persons with notice of the permanent injunction, are hereby permanently enjoined from seeking any judgment or administrative ruling that would invalidate or otherwise interfere with implementation of the Order, including the Building Permit issued thereunder, other than by a direct appeal of this Court's Order or other filings in this action or in the Related Action.

BY THE COURT

Dated: March 15, 2002

ALAN H. NEVAS
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CIVIL ACTION NO. 301CV2178 (AHN)
January 24, 2002

CONNECTICUT YANKEE ATOMIC POWER COMPANY,

Plaintiff,

—v.—

TOWN OF HADDAM, TOWN OF HADDAM BOARD OF SELECTMEN, CYNTHIA WILLIAMS, in her capacity as the Town of Haddam Zoning Enforcement Officer, and ALAN PASKEWICH, in his capacity as the Town of Haddam Building Official,

Defendants.

ORDER ON CONSENT OF PARTIES

WHEREAS, plaintiff Connecticut Yankee Atomic Power Company ("Connecticut Yankee") commenced this action against defendants Town of Haddam, Town of Haddam Board of Selectmen, Cynthia Williams, in her capacity as the Town of Haddam Zoning Enforcement Officer, and Alan Paskewich, in his capacity as the Town of Haddam Building Official (collectively, the "Defendants") by complaint dated November 21, 2001 (the "Action");

WHEREAS, (Connecticut Yankee claims in the Action that it has the right under its federal license and federal law and regulation to transfer its spent nuclear fuel and other radioactive waste (the "Waste") to a dry cask independent spent fuel storage installation ("ISFSI") to be constructed on its Haddam, Connecticut property (the "Property") in the location selected by Connecticut Yankee on the eastern portion of the Property approximately three-quarters of a mile from the existing principal operations buildings (the "ISFSI Site");

WHEREAS, the Defendants have maintained in defense of the Action that Connecticut Yankee has no right to build a storage facility for the Waste outside the area of land designated for development by the Town of Haddam in 1962 and by making this agreement the Town is in no way retreating from that position.

WHEREAS, the Waste was generated during the 30-year period of operation by Connecticut Yankee of a commercial nuclear electric generating facility (the "Plant") licensed pursuant to the Atomic Energy Act of 1954, 42 U.S.C. § 2011 *et seq.*, and located on the Property.

WHEREAS, the majority of the Waste is currently stored in a wet pool system located on the Property;

WHEREAS, the United States Department of Energy ("DOE") is obligated by contract to take possession of and remove the Waste from the Property but has stated it will not do so until the federal government establishes a high level nuclear waste repository;

WHEREAS, Connecticut Yankee is required under the terms of its operating license to ensure the storage, control and maintenance of the Waste in a safe condition;

WHEREAS, Connecticut Yankee has determined that until the removal of the Waste from the Property by the DOE, storage of the Waste is best and most safely accomplished in the proposed ISFSI on the ISFSI Site. The topography and location of the ISFSI Site are desirable from a security standpoint given the terrorist events of September, 2001. The ISFSI Site is located in a valley surrounded by tall natural ridgelines which provide physical protection to the ISFSI. The ISFSI site is naturally screened from the Connecticut River and the Salmon River, both of which abut the Property;

WHEREAS, Connecticut Yankee has previously obtained from the Haddam Inland Wetlands Commission a wetlands permit in connection with the proposed ISFSI, which permit remains valid and in full force and effect;

WHEREAS, Connecticut Yankee is in the process of decommissioning the Plant and the Property as required by its federal license;

WHEREAS, Connecticut Yankee has been exploring and will continue to explore the potential donation, following the completion of decommissioning of a portion of the Property to a third party to be held for conservation purposes; and

WHEREAS, as the parties wish to resolve the issues involved in this litigation.

NOW, THEREFORE, in consideration of the mutual agreements set forth herein, the parties agree to the entry of an Order by the Court on the following terms and conditions;

1. Defendants agree that Connecticut Yankee may proceed with the construction, implementation and operation of the proposed ISFSI on the ISFSI Site selected by Con-

necticut Yankee for purposes of storage of the Waste. The ISFSI Site is identified on Exhibit A attached hereto.

2. Defendants shall issue a building permit for the ISFSI and related improvements in substantially the form attached hereto as Exhibit B immediately upon entry of this Order by this Court herein.

3. Defendants consent to the entry by this Court of a permanent injunction enjoining Defendants, and all other persons acting in concert with them or pursuant to their direction, from acting in any way to prevent, impede, interfere with or delay Connecticut Yankee's construction, implementation or operation of the ISFSI, and such injunction is hereby ordered.

4. Connecticut Yankee may make modifications to the ISFSI and related improvements which are intended to enhance the security of the ISFSI and/or as required by applicable federal regulation, directive or guidance. Such modifications shall comply with Haddam health, wetlands and building codes. In the event of a conflict between such municipal health, wetlands and building codes and federal regulation, directive or guidance, then the federal regulation, directive or guidance shall prevail.

5. Connecticut Yankee and it successors and assigns are prohibited from storing any spent nuclear fuel or other radioactive waste on the Property that was used or generated in the production of electric power at the Plant now or formerly located on the Property, and shall execute and deliver to the Town of Haddam, within thirty (30) days after the Order entered by this Court herein becomes final and nonappealable, a written Agreement of Covenants and Restrictions precluding such use. Such Agreement of Covenants and Restrictions shall be in the form attached hereto as Exhibit C. Any Connecticut Yankee Waste

which is currently stored in Morris, Illinois pursuant to a contract with General Electric Company will be stored on the Property only if Connecticut Yankee is either obligated to remove such materials from their present location or directed to remove such materials from their present location and/or to store them on the Property by government order, directive or regulation.

6. Connecticut Yankee shall make the following payments to the Town of Haddam:

(i) Annual payments to the Town of Haddam commencing in 2002 and continuing through 2011, provided that: (a) the Waste remains on the Property; and (b) ownership of the Waste is not transferred to the DOE or any successor agency (the "Annual Payment"). The initial Annual Payment shall be in the amount of $1,000,000. Each subsequent Annual Payment shall be increased by 2.5%. Each Annual Payment shall be made in two equal installments, due and payable on July 31 and January 31;

(ii) Connecticut Yankee shall pay to the Town of Haddam an $800,000 repowering transition payment within five (5) business days after the Order entered by this Court herein becomes final and nonappealable; and

(iii) In the event that Connecticut Yankee sells a portion of the Property for construction of a gas-fired electric generation facility ("Gas Plant") or some other commercial use, then Connecticut Yankee shall also pay to the Town of Haddam, within five (5) business days of Connecticut Yankee's receipt of payment of the full sale price of the portion of the Property upon which such Gas Plant or other use is to be built, and in no event later than five (5) years from the closing of such sale, a payment in an amount of equal to the lesser of $1,4000,000 or 10.8% of the sale price of such property.

The payments set forth in subparagraphs (i), (ii) and (iii) of this paragraph 6 shall not be due and payable until the Order entered by this Court herein becomes final and nonappealable.

Connecticut Yankee shall receive a credit against the payments set forth in subparagraphs (i), (ii) and (iii) of this paragraph 6 in an amount equal to the municipal property tax due and payable by Connecticut Yankee to the Town of Haddam for the grand lists of October 1, 2001 through October 1, 2010 in respect of the Property and any and all improvements and personal property located thereon, including the ISFSI and all components thereof, and any such credit which is not exhausted in a particular year may be carried forward and applied to future payments under this paragraph 6. If after giving effect to the credits described in the previous sentence, the taxes due the Town of Haddam exceed the total of the payments set forth in subparagraphs (i), (ii) and (iii) of this paragraph 6, such difference will be paid to the Town of Haddam in two equal installments, due and payable July 31, and January 31. Subject to the provisions of this paragraph 6, Connecticut Yankee retains all rights, including all rights of appeal, available to it under Title 12 of the Connecticut General Statutes and other applicable Connecticut law to contest any assessment imposed by the Town of Haddam on the Property and any and all improvements located thereon, including the ISFSI, and the terms of the Order entered herein shall not constitute evidence of or an admission by any party as to the value of any such property and shall not be considered as evidence in any assessment, valuation or related proceeding. The obligation to make all payments due to the Town of Haddam shall be binding on any successor or assign of Connecticut Yankee except the DOE or any successor agency.

7. Connecticut Yankee shall install and maintain the following in connection with the ISFSI:

(i) an ISFSI pad water runoff radionuclide composite sampler,

(ii) ISFSI pad radiation monitors; and

(iii) a vehicle barrier system.

Connecticut Yankee shall take all reasonable steps to enter into a contract for procurement and fabrication at the earliest practicable date, subject to regulatory requirements and commercial conditions, of a fuel transportation cask which will be available, if necessary, to allow transportation of the Waste from the Property. Connecticut Yankee shall, prior to December 31, 2002, provide the Town of Haddam, with a copy of Connecticut Yankee's written plan for addressing the potential occurrence of damage to the storage casks.

8. This Court will retain jurisdiction to adjudicate all disputes of any nature arising from the interpretation or enforcement of the Order entered herein, and no such dispute may be raised or adjudicated in any other forum excerpt by written agreement of all of the parties.

9. This Order is limited in applicability to the issues in raised in the Action regarding the construction, operation and maintenance of the ISFSI. The Order shall not be binding on any future application regarding the Property which is unrelated to the construction, operation or maintenance of a storage facility for the Waste on the Property by Connecticut Yankee. The Order shall not have precedential value in any action or proceeding which is unrelated to the construction, operation or maintenance of the ISFSI.

10. Each party will bear its own costs and attorneys fees.

11. Effective upon the Order entered by this Court herein becoming final and nonappealable: Plaintiff and Defendants hereby mutually release each other and all of their respective present and former employees, agents, officers, directors, attorneys and elected officials from any and all claims or causes of action asserted in the Action, except as to claims and obligations arising from this Order on Consent of Parties; and Connecticut Yankee shall file a suggestions of mootness as to the appeal now pending before the United States Court of Appeals for the Second Circuit bearing docket number 01-7737, captioned *Connecticut Yankee Atomic Power Company v. Town of Haddam Planning and Zoning Commission, et al.* and shall request that the Court of Appeals dismiss the appeal. Each party shall bear its own costs and attorneys' fees.

SO ORDERED

January 29, 2002 ALAN H. NEVAS

Alan H. Nevas, U.S. District Judge

Consented to as to form and substance.

PLAINTIFF,
CONNECTICUT YANKEE ATOMIC
POWER COMPANY

By JOHN B. NOLAN
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Allan B. Taylor (ct05332)
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Its Attorneys

DEFENDANTS,
TOWN OF HADDAM, TOWN OF
HADDAM BOARD OF SELECT-
MEN, CYNTHIA WILLIAMS in
her capacity as the Town of
Haddam Zoning Enforcement
Officer, and ALAN PASKEWICH,
in his capacity as the Town of
Haddam Building Official

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Their Attorney

TOWN OF HADDAM

By ANTHONY BONDI
Anthony Bondi, First Selectman

By KEITH AINSWORTH
Keith Ainsworth, Selectman

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May 13, 2002

Inland Wetlands Commission
Town of Haddam
30 Field Park Drive
Haddam CT 06438

Re: Connecticut Yankee Atomic Power Company
Letter to Proceed

Dear Commissioners:

On behalf of Neighbors Opposed to Residential Atomic Dumps ("NORAD"), I write to inform you of the unlawful issuance of a "Partial Letter to Proceed" by your Wetlands Enforcement Officer dated May 2, 2002. A copy of the "Partial Letter to Proceeds" is attached.

This is therefore to request your immediate revocation of the Partial Letter to Proceed.

The Letter to Proceed was issued in clear violation of your Regulations, the conditions of the permit issued to CYAPCo and to the extent that the Inland Wetlands Commission of the Town of Haddam is permitting construction activities pursuant to the permit at the present time it is acting in clear and flagrant violation of law.

Connecticut General Statutes Section 22a-42a(d)(1) governs this matter.

Section 22a-42a(d)(1) provides in pertinent part as follows:

> No person shall conduct any regulated activity within an inland wetland or watercourse which requires zoning or subdivision approval without first having obtained a valid certificate of zoning or subdivision approval, special permit, special exception or variance or other documentation establishing that the proposal complies with the zoning or subdivision requirements adopted by the municipality pursuant to chapters 124 to 126, inclusive, or any special act.

Section 22a-42a(d)(1) is a mandatory provision of state law. Neither the Town of Haddam nor any of its land-use agencies has authority to override; supersede, ignore or disregard mandatory state law requirements arising under the Inland Wetlands Watercourses Act of the State of Connecticut.

The conduct of the Inland Wetlands Commission's agent in issuing the "Partial Letter to Proceed" is all the more shocking in view of the fact that such agent was previously notified on March 28, 2002 of the illegal conduct of CYAPCo in engaging in construction activities within a regulated area without zoning compliance and without having obtained a Letter to Proceed, and in light of the fact that your Commission was notified by letter on April 8, 2002 that it lacks authority to issue a Letter to Proceed in the absence of zoning compliance.

The present circumstances have created the appearance of a cascading rule of lawlessness by the Town of Haddam as pertaining to the Connecticut Yankee site.

This erosion of the rule of law must stop.

May my clients trust that the Inland Wetlands Commission of the Town of Haddam will henceforth honor the mandatory requirements of state and municipal law by revoking the Partial Letter to proceed and requiring that CYAPCo establish its lawful right to engage in regulated activities.

Very truly yours,

NANCY BURTON
Nancy Burton, Esq.

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May 13, 2002

Inland Wetlands Commission
Town of Haddam
30 Field Park Drive
Haddam CT 06438

Re: Bruno R. Morasutti

Dear Commissioners:

On behalf of Neighbors Opposed to Residential Atomic Dumps ("NORAD"), I respectfully request that your attorney, Mr. Morasutti, disqualify himself henceforth from matters pertaining to the Connecticut Yankee Atomic Power Company.

I present this request reluctantly, because I strongly believe in the right of an individual or an agency to select counsel of his, her and its choosing.

However, in this case, Mr. Morasutti suffers from a clear conflict which jeopardizes your right to fair and vigorous representation as you undertake to discharge your responsibilities under law to uphold the public trust in the environment of our state.

As you may know, Mr. Morasutti represented the Board of Selectmen in its decision, by a 2-1 vote on January 23, 2002, to approve an "Agreement" to settle litigation

brought by CYAPCo concerning its plans for nuclear waste storage in a residential zone.

Under Mr. Morasutti's counsel, the Selectmen—again, by a 2-1 vote—entered into an Agreement that states in part as follows:

"WHEREAS, Connecticut Yankee has previously obtained from the Haddam Inland Wetlands Commission a wetlands permit in connection with the proposed ISFSI, which permit remains valid and in full force and effect . . ."

The Inland Wetlands Commission is presently called upon to determine whether it issued such permit in reliance upon information provided by CYAPCO which was knowingly false, incomplete and inaccurate in material respects.

Should the Commission determine that CYAPCo did knowingly present false, inaccurate and incomplete information to secure the permit, as a matter of law and public policy the Commission must revoke the permit.

Mr. Morasutti's letter to you of April 22, 2002 counsels erroneously against convening the very meeting you are scheduled to hold this evening to consider these serious issues.

We presume that Mr. Morasutti has counseled your Commission and its Wetlands Enforcement Officer to issue the "Partial Letter to Proceed" on May 2, 2002, which act clearly contravened mandatory state law and violated as well your regulations and the conditions of the permit you issued to CYAPCo. We object to the Haddam Inland Wetlands Commission being counseled to wilfully break the law, *ad seriatim*.

It is indeed time for the Commission to engage independent counsel who is not wedded to the Agreement which the Attorney General of this state has pronounced a manifestation of lawlessness.

On behalf of NORAD, I thank you for your consideration.

Very truly yours,

NANCY BURTON
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May 30, 2002

Mark Stephens, Chairman
Inland Wetlands Commission
Town Hall
Haddam CT 06438

Re: Connecticut Yankee Atomic Power Company

Dear Mr. Stephens:

This letter is submitted on behalf of Neighbors Opposed to Residential Atomic Dumps (NORAD) with two requests.

First, NORAD requests that the Commission schedule a site inspection prior to the commencement of the public hearing on June 10 on CYAPCo's application to conduct regulated activities in the vicinity of a previously unidentified intermittent watercourse.

We believe a site inspection is a necessary part of the regulatory process and is particularly important in this case, given the issues which have arisen with respect to CYAPCo's failure to accurately identify natural features in its prior application. As you know, the Commission approved that significant application without conducting a site inspection.

"An Inland Wetland Commissioner's Guide to Site Plan Review," published by DEP in 1992, encourages

site walks because they can aid in accomplishing the following goals:

(1) Understand the physical and natural characteristics of the site and its surroundings;

(2) Develop a feel for wetland quality, functions and values;

(3) Confirm the accuracy of the plans and delineated regulated area; and

(4) Examine the areas of regulated activities and determine wetland impacts.

Expanding on the issue of accuracy, the Guide further states as follows:

"Another important function of the site walk is to verify the accuracy of the plans. Walk the regulated area and note any differences between the plans and what field observations may suggest. Identify visually the extent to which any regulatory buffers enlarge the regulated area. Note the wetland species listed on the site plan and supporting documentation and verify their existence (in the densities indicated) in the field."

For your assistance, I am attaching the 3 pages of the Guide which discuss site walks.

This letter is to further request that the Commission also schedule further discussion at its June 10 meeting of the petition submitted by 25 Haddam residents requesting revocation of the wetlands permit issued in 2000 to CYAPCo. We believe the public interest will best be served if the important issues raised in the petition are considered as soon as possible. Because the petition's subject matter relates in part to the new CYAPCo application,

the Commission's time and energies will be most efficiently applied if both matters are scheduled for June 10.

I thank you for your consideration.

Sincerely,

NANCY BURTON
Nancy Burton, Esq.

cc: Commission Members
Encl.

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May 30, 2002

Mark Stephens, Chairman
Inland Wetlands Commission
Town Hall
Haddam CT 06438

Re: Connecticut Yankee Atomic Power Company

Dear Mr. Stephens:

This letter is submitted on behalf of Neighbors Opposed to Residential Atomic Dumps (NORAD). It concerns excavation of earth materials within the "borrow area" of the CYAPCo property for use in conjunction with the proposed Independent Spent Fuel Storage Installation.

As you know, a petition submitted on behalf of 25 Haddam residents has requested that the Inland Wetlands Commission revoke the permit issued to CYAPCo in 2000 in part because CYAPCo omitted to inform the Commission fully of the character and makeup of the earth materials in the area which is variously referred to as "borrow area," "southeast landfill area," the "shooting range" and the area denoted in CYAPCo's License Termination Plan as "9535."

To date, the Commission has taken no action to revoke the permit.

This is therefore to request, pursuant to the provisions of the Connecticut Freedom of Information Act, that the Commission and its enforcement officer release for public inspection any and all records it and she possess concerning inspection of this "borrow area" site and any soil and water sampling which has been performed to determine the radioactive and chemical content of the soils and groundwater and the extent of the contamination.

If the Commission and its enforcement officer have not yet sampled the soils and groundwater to determine the extent of radioactive and chemical contamination, this is an urgent request that such sampling be done forthwith.

By way of background, I am attaching a copy of testimony presented by James K. Joosten, as a consultant to the Connecticut Department of Public Utility Control, during 1997 proceedings before the Federal Energy Regulatory Commission. See particularly pages 5, 7-11, 21, 26-30, 42-45, 50-51, 56.

Mr. Joosten addressed the issue of contamination found in this area three-quarters of a mile from the reactor as follows:

"The 'shooting range' illustrates many of the breakdowns in radiological controls that persist at Connecticut Yankee. [Exhibit references omitted.] First, this area is an eyesore of scrap, concrete, asphalt, soil, sand and junk that was placed here instead of performing appropriate disposal. [Exhibit reference omitted.] Second, the soil is contaminated non-uniformly, i.e., the contamination level actually increases with depth. Third, the Company has posted the area as a radioactive materials controlled area, but there are no guards, no personnel monitors or frisking equipment, and no effective controls

over entry. Fourth, the health physics technicians have merely left the contaminated materials and soil out in the open air where they may continue to blow about and leach into the soil. Only after I suggested that the soil should be covered with a tarp was any action taken to mitigate the spread of contamination. Fifth, the area is now enclosed with a chain-link fence, but there appears to be no sound rationale for choosing its boundaries. Sixth, apparently the dump materials were placed at the 'shooting range' at various times and from various locations on the plant site. There are no records for this waste site. Finally, the health physics technicians who took soil samples earlier, wore latex gloves as protection from the radiological risk of handling the soil. Contrary to all reasonable procedures, however, the technicians merely dropped the gloves on the ground. [Exhibit reference omitted.] Other gloves were littered about, dumped on the ground, or used for other purposes." [Emphasis added.]

This is to further request that the Commission include the subject of CYAPCo's use of radiologically contaminated soils in the current construction project, and the status of controls to avoid further contamination of the area and groundwater, on the agenda of its June 10 meeting.

If you have any questions concerning this matter, please do not hesitate to give me a call.

Sincerely,

NANCY BURTON
Nancy Burton, Esq.

cc: Commission Members
Encl.